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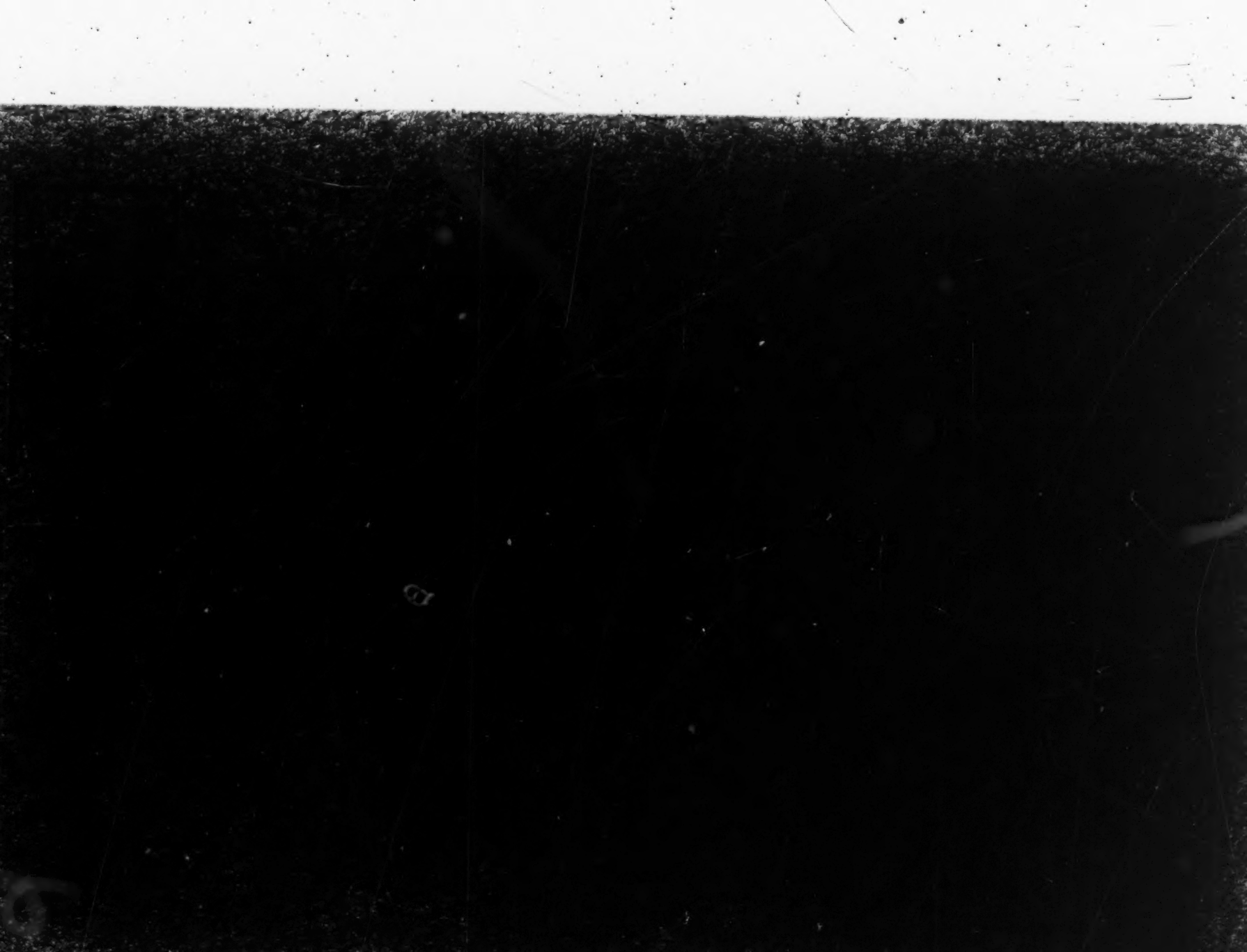

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 12, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA

MOTION TO STRIKE ANSWER

The United States of America, by its Attorney General and its Solicitor General, moves the Court to strike the entire answer of the State of California filed herein on the 4th day of February, 1946, for the reason that the answer is prolix and so replete with arguments, evidentiary matter and conclusions, both of law and of fact, that it is virtually impossible to segregate and identify the well-pleaded facts for the purpose of determining the issues intended to be tendered.

TOM C. CLARK,
Attorney General.

J. HOWARD MCGRATH,
Solicitor General.

MARCH 1946.

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UNITED STATES OF AMERICA, PLAINTIFF

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MEMORANDUM IN SUPPORT OF MOTION TO STRIKE ANSWER

1. The answer filed by the State of California occupies three volumes and consists of 822 printed pages in addition to numerous exhibits. It is respectfully submitted that this document, which obviously violates hitherto accepted standards for the framing of issues in a justiciable controversy, should be entirely stricken. The objection to the answer goes to the very heart of the future conduct of this litigation and is not pitched on any technical grounds of draftsmanship.

Apart from its excessive prolixity, the document is replete with matters of argument, evidence—most of it of only colorable relevance—and conclusions of law and fact. Throughout the three volumes there appear numerous citations to

and quotations from court decisions, administrative rulings and legal and historical treatises, all of which can serve only the purpose of argument. Included in the great mass of evidentiary material are hundreds of references to instances in which the United States has allegedly acquired title to submerged lands, not only within California, but also (pp. 529–739) within twenty-five other states and Alaska—intermingling indiscriminately matters relating to lands under rivers, harbors, bays and the like, which are not in issue herein, along with allegations dealing with lands under the three mile belt, which are the subject of this suit.[1]

Even a cursory examination of the answer will reveal that conclusions of law and fact are inextricably interwoven throughout the document, and that there are pleaded a vast number of items of evidence, many of which are accompanied by maps, exhibits and isolated excerpts from what appear to be letters, deeds and other instruments,

[1] The instances are too numerous to mention and the confusion due to such intermingling pervades the entire three volumes. Several striking examples, however, may be singled out. Thus, numerous allegations are set forth with respect to submerged lands at Oakland, California, which are located within San Francisco Bay, and not within the three-mile belt on the open sea. (Answer, pp. 363–403.) And allegations are made relating to submerged lands in Pennsylvania (pp. 685–687), which is not exposed at all to the ocean. Regardless of whether such matters may have any argumentative bearing upon the issues actually raised by the complaint, it is only too clear that they have no place in an answer.

which have not even been subjected to the rules of admissibility before becoming a part of the record. They have no place in a pleading.

These objections are not merely formal. The defendant has asked for the appointment of a master "to take evidence of the issues framed" by the pleadings. (P. 822.) In view of the present state of the pleadings, it is difficult to know what issues of fact may be submitted to a master. Indeed, it is doubtful whether there are any issues of fact herein that are properly referable to a master. But the answer leaves this case in such a state of obfuscation that it becomes virtually impossible to plan the future conduct of this litigation. Neither the Court nor the Government should be confronted with the burden of attempting to segregate the relevant from the great mass of the irrelevant in the answer in order to determine what issues of law and what issues of fact, if any, are to be tendered.

2. Although this Court has not adopted rules of practice specifically applicable to original proceedings, Rule 5 of the Revised Rules provides that cases on the original docket shall be governed, as far as may be, by the rules applicable to cases on the appellate docket.[2] And while there are no

[2] Rule 5, in its present form, was adopted in 1939. 306 U. S. 671, 687. Prior thereto, and for nearly a century and a half, the Court had indicated that it "considers the former practice of the courts of king's bench and of chancery, in England, as affording outlines for the practice of this court

provisions of the appellate rules squarely applicable to the present situation, every indication points to the impropriety of the State's answer. Rule 38 (2) requires petitions for writs of certiorari and briefs in support thereof to be "direct and concise". Cf. also Rules 13 (9) and 27 (2) (c) and (d).[3]

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in matters not covered by its rules or decisions, or the laws of Congress." Rule 5, 286 U. S. 596; compare 2 Dall. 414; 1 Cranch xvii; see *California* v. *Southern Pacific Co.*, 157 U. S. 229, 248–249.

The attitude of the early English chancery courts towards pleadings of inexcusable prolixity may be seen in *Punishment of Richard Mylward for drawing, devising, and engrossing a Replication of the length of Six score Sheets of Paper* (1596), Monro, Acta Cancellariae (1847) 692, noted in 5 Holdsworth, *History of English Law* (1924) 233 and in 9 *id.* (1926) 389. In that case, the filing of a replication amounting to six score sheets of paper which "might have been well contrived in sixteen sheets of paper", so outraged the court that, in addition to imposing a fine upon the pleader, it ordered that the Warden of the Fleet take the pleader into custody and "bring him into Westminster Hall, on Saturday next, about ten of the clock in the forenoon, and then and there shall cut a hole in the *myddest* of the same engrossed replication * * * and put the said Richard's head through the same hole * * * and then, the same so hanging, shall lead the same Richard, bare headed and bare faced, round about Westminster Hall, whilst the Courts are sitting, and shall shew him at the bar of every of the three Courts within the Hall * * *."

[3] In *Stevens* v. *The White City*, 285 U. S. 195, 204, the respondent was charged the costs of the printing of unnecessary parts of the record to the extent of 186 pages. See also *Houston* v. *Southwestern Tel. Co.*, 259 U. S. 318, 325, where the Court referred to its rules in regard to brief statements of the evidence and argument and declared "the first of these

As recently as the 1944 Term, this Court denied a petition for certiorari for failure to comply with Rule 38 (2), stating that "The brief filed in support of the petition [129 pages] is not 'direct and concise' as required by that rule." *Glick Brothers Lumber Co.* v. *Bowles,* 325 U. S. 877. Similar rulings were made in *Winston* v. *Courtney,* 322 U. S. 731; *Kennemer* v. *Billington,* 323 U. S. 709. Cf. *Gilchrist* v. *Interborough Rapid Transit Co.,* Sup. Ct. Journal, Oct. Term 1928, p. 101.

While it is necessary that briefs be "direct and concise", it is even more vital that pleadings be "direct and concise." For, unlike briefs, the pleadings are the operative documents in the lawsuit that frame the issues to be decided. It is of the highest importance, therefore, to the Court as well as the parties, that the issues to be tried, argued, and decided be defined with reasonable clarity. Otherwise, the suit may degenerate into a state of anarchic confusion. Reference of this

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rules has been wholly ignored in the printing of this record and the second has been so neglected in the preparation of the briefs that it is impossible for the court to consider this question except by itself reading and briefing the voluminous record. This we cannot consent to do * * *." Compare *Benites* v. *Hampton,* 123 U. S. 519, 521, where the case was dismissed because of failure to comply with the rules, the Court stating that it was unwilling to "hunt through what is called a 'proposed statement on appeal and motion for a new trial,' filling thirty pages of the record" in order to determine what question was presented.

case to a master to take evidence on the issues purportedly raised by the present answer, whatever they may be, can result only in protracted delays and virtually indefinite hearings on the great multitude of evidentiary matters alleged in the answer. On the other hand, if an appropriate answer were filed, raising clear-cut issues, the Government would then be in a position to ask for judgment on the pleadings or to consent to the reference of the case to a master in the event that triable issues of relevant fact are tendered. Only in such manner can this case be presented for orderly adjudication.

The Court has apparently had little occasion to pass on the matter of improper pleadings in original proceedings. However, in other cases before it the Court has left no doubt as to its views in regard to this subject. In *McFaul* v. *Ramsey,* 20 How. 523, 524, it was declared that pleadings should "clearly, distinctly, and succinctly, state the nature of the wrong complained of, the remedy sought, and the defence set up. The end proposed is to bring the matter of litigation to one or more points, simple and unambiguous." In keeping with this general principle, the Court has expressed disapproval of pleadings on the ground of prolixity (*Mumm* v. *Decker & Sons,* 301 U. S. 168, 170), the inclusion of evidentiary matter (*McAllister* v. *Kuhn,* 96 U. S. 87, 89), and the pleading of conclusions (*Gold-Wash-*

ing & Water Co. v. *Keyes*, 96 U. S. 199, 202; *Fogg* v. *Blair*, 139 U. S. 118, 127; *Kent* v. *Lake Superior Canal Co.*, 144 U. S. 75, 91).

Indications of the Court's attitude in regard to brevity in pleadings will also be found in its promulgation of the Federal Equity Rules (Rules 25 and 30)[4] and the Federal Rules of Civil Procedure, which specifically require averments to be "simple, concise, and direct" (Rule 8 (e))[5] and contemplate "simplicity and brevity of statement" (Rule 84). In construing the new rules, the lower federal courts, in keeping with the general principles announced by this Court, have insisted that counsel adhere to established standards of good pleading.[6] Although the Federal Rules of Civil

[4] See opinion rendered by Mr. Chief Justice Hughes in *Mumm* v. *Decker & Sons*, 301 U. S. 168, at pages 170–171.

[5] "These provisions [Rule 8] but illustrate the purpose, implicit throughout the new Rules, to require brief, conclusive pleadings." *Fleming* v. *Wood-Fruitticher Grocery Co.*, 37 F. Supp. 947, 948 (N. D. Ala.). See also remarks of Hon. Charles E. Clark, 15 Tenn. L. Rev. 551, 552, 564–565 (1939), Hon. W. Calvin Chesnut, 22 A. B. A. J. 533, 536 (1936), and Prof. C. F. Luberger, 13 U. of Cin. Law Rev., 39–40 (1939).

[6] Illustrative of the many rulings by the lower Federal courts on this subject are the following, grouped according to the nature of the offensive pleading:

PROLIXITY: *Barnhart* v. *Western Maryland Ry. Co.*, 128 F. 2d 709, 710 (C. C. A. 4; 17 pages); *Booth Fisheries Corporation* v. *General Foods Corp.*, 27 F. Supp. 268, 270 (D. Del.; 22 pages, with 100 pages of exhibits); *Chambers* v. *Cameron*, 29 F. Supp. 742, 743–744 (N. D. Ill.; 31 typewritten pages, with exhibits, 45 pages); *Barnsdall Refining Corporation* v.

Procedure are not controlling here, they nevertheless furnish a sound guide for all proceedings throughout the Federal judicial system. Cf. *Regal Knitwear Co.* v. *Board,* 324 U. S. 9.

The circumstance that the answer in question has been filed by a State of the Union rather than by a private litigant in no sense requires a different result. To be sure, there may be appropriate occasions for the relaxation of technical rules in favor of a sovereign where there is "no injustice to the opposing" sovereign, and where such relaxation "but affords an additional opportunity to guard against the possibility of error." *Virginia* v. *West Virginia,* 234 U. S. 117, 121. But the situation herein involves more than mere technical rules. Far from being a safeguard against error, the relaxation of accepted standards here will promote confusion that

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Birnamwood Oil Co., 32 F. Supp. 308, 310 (E. D. Wis.; incorporation of a 21-page indictment); *Buckley* v. *Altheimer*, 2 F. R. D. 285 (N. D. Ill., 260 pages).

ARGUMENTATIVE PLEADINGS: *Hindleman* v. *Specialty Salesman Magazine, Inc.*, 1 F. R. D. 272 (N. D. Ill.); *Strahle-Johnson Supply Co.* v. *John Douglas Co.*, 1 F. R. D. 279 (E. D. Tenn.).

PLEADING MATTERS OF EVIDENCE: *Southern Pacific Co.* v. *Conway*, 115 F. 2d 746, 750 (C. C. A. 9); *Cantanzaritti* v. *Bianco*, 25 F. Supp. 457 (M. D. Pa.); *Satink* v. *Holland Township*, 28 F. Supp. 67, 70 (D. N. J.); *Shultz* v. *Manufacturers & Traders Trust Co.*, 1 F. R. D. 53, 55 (W. D. N. Y.).

PLEADING CONCLUSIONS: *Foley-Carter Ins. Co.* v. *Commonwealth Life Ins. Co.*, 128 F. 2d 718, 720 (C. C. A. 5); *Zimmerman* v. *National Dairy Products Corp.*, 30 F. Supp. 438, 439 (S. D. N. Y.).

would enhance the "possibility of error". Surely, it is a matter of high public importance that the United States, no less than the individual States, be not placed at a disadvantage in the conduct of its litigation; and where such a serious departure from accepted standards on the part of the State threatens the orderly progress of this case, there is no basis for the abandonment of such standards merely because one of the litigants is a State. Particularly is it important that these standards be observed in a case of such great public significance, so that the issues involved may be clearly understood.

Respectfully submitted.

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MARCH 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946